

88-184

Supreme Court, U.S.  
**FILED**

JUL 22 1988

JOSEPH F. SPANIOL, JR.,  
CLERK

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IN THE

**SUPREME COURT**

**of the**

**UNITED STATES**

Fall Term, 1988

No. \_\_\_\_\_

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ERNEST N. THARP,  
*Petitioner,*

vs.

PHYLLIS M. THARP,  
*Respondent*

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**PETITION FOR A WRIT OF CERTIORARI TO THE**  
**SUPREME COURT OF THE UNITED STATES**

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## **QUESTIONS PRESENTED**

1. Was the Petitioner, Ernest M. Tharp, deprived of rights granted to him by the Congress of the United States of America under the Uniformed Services Former Spouses Protection Act, (hereinafter referred to as "USFSPA"), 10 U.S.C. Section 1408 (1982) Pub.L. No. 97-252?

2. Was the taking of a portion of the retired military pay of the Petitioner, Ernest M. Tharp in excess of that permitted by 10 U.S.C. Section 1408 and Section 1006(b) of Public Law 97-252 a deprivation of Petitioner's property, title, rights, privileges and immunities as guaranteed by the 5th and 14th Amendments of the United States Constitution?

3. Is RCW 26.09.080, which provides that in a proceeding for Dissolution of Marriage, the Court shall make a disposition of the property and liabilities of the parties, either separate or community, as shall appear just and equitable, as enforced and applied to the retired military pay of Petitioner Ernest Tharp, repugnant to 10 U.S.C. Section 1408 (1982) USFSPA and Section 1006(b) of Public Law 97-252 and therefore invalid, as being preempted by Article VI CL 2 of the United States Constitution?



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ERNEST N. THARP,  
*Petitioner,*

vs.

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*Respondent*

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**PETITION FOR A WRIT OF CERTIORARI TO THE  
SUPREME COURT OF THE UNITED STATES**

Petitioner prays that a Writ of Certiorari issue to review the judgment of the Supreme Court of the State of Washington entered in the above cause on May 4, 1988, denying a petition for review and sustaining the decision of the Court of Appeals of the State of Washington, Division II entered on February 10, 1988.

**I****CITATIONS TO OPINION BELOW**

The opinion of the Court of Appeals of the State of Washington, Division II, attached hereto as Appendix A, is an unpublished opinion.

The order of the Supreme Court of the State of Washington denying the Petition for Review is attached hereto as Appendix B.

The mandate from the Court of Appeals, filed on May 6, 1988, is attached hereto as Appendix C.

**II****JURISDICTION**

The decision and judgment of the Court of Appeals of the State of Washington, Division II was entered on February 10, 1988.

The order of the Supreme Court of the State of Washington denying the Petition for Review was entered on May 4, 1988.

The mandate of the Court of Appeals terminating review was entered on May 6, 1988.

Jurisdiction of this Court is invoked under Title 28 United States Code, Section 1257 (3) providing for review of any deprivation of any property, title, right, privilege or immunity as set up or claimed under the Constitution of the United States of America. Jurisdiction is also invoked under Title 28, United States Code, Section 1257 (2) providing for review wherein the question of the validity of any statute of any state on the ground of its being repugnant to the Constitution or statutes of the United States, and the decision is in favor of the validity of the statute as set up or claimed. \*

**III****QUESTIONS PRESENTED**

1. Was the Petitioner, Ernest M. Tharp, deprived of rights granted to him by the Congress of the United States of America under the Uniformed Services Former Spouses Protection Act, (hereinafter referred to as "USFSPA"), 10 U.S.C. Section 1408 (1982) Pub.L. No. 97-252?

2. Was the taking of a portion of the retired military pay of the Petitioner, Ernest M. Tharp in excess of that permitted by 10 U.S.C. Section 1408 and Section 1006(b) of Public Law 97-252 a deprivation of Petitioner's property, title, rights, privileges and immunities as guaranteed by the 5th and 14th Amendments of the United States Constitution?

3. Is RCW 26.09.080, which provides that in a proceeding for Dissolution of Marriage, the Court shall make a disposition of the property and liabilities of the parties, either separate or community, as shall appear just and equitable, as enforced and applied to the retired military pay of Petitioner Ernest Tharp, repugnant to 10 U.S.C. Section 1408 (1982) USFSPA and Section 1006(b) of Public Law 97-252 and therefore invalid as being preempted by Article VI clause 2 of the United States Constitution?

**IV****CONSTITUTIONAL PROVISIONS**

The Constitution of the United States, Amendment V:

"No Person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

The Constitution of the United States, Amendment XIV, Section 1.

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

The Constitution of the United States, Article VI, Clause 2:

"This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

## STATEMENT OF THE CASE

### A. NATURE OF ACTION:

Petitioner, the Plaintiff below, seeks to reverse the final decision of the Supreme Court of the State of Washington, sustaining the Court of Appeals of the State of Washington, Division II, sustaining the judgment of the Superior Court of the State of Washington for Thurston County, which allows the Respondent a greater portion of the Petitioner's retired military pay than what is permitted by the laws of the United States.

### B. PLEADINGS AND PROCEEDINGS:

The parties were formerly husband and wife. In 1969, the Petitioner commenced a divorce action against the Respondent. After a trial, Findings of Fact, Conclusions of Law and Decree of Dissolution of Marriage were entered on November 17, 1977. At the time of commencement of the action, Petitioner was a member of the military service. He had retired by the time of trial. In 1980, Respondent sought to modify or clarify the Decree. Respondent caused a Writ of Garnishment to be served upon Petitioner and the United States Government. In 1984, Respondent commenced a proceedings against Petitioner in Arizona.

Petitioner filed a Petition in 1984 in the Superior Court of the State of Washington for Thurston County seeking relief from the actions of Respondent. Respondent filed a Counter-Petition in February of 1985. Petitioner served and filed an Answer to the Counter-Petition. The case was tried. Findings of Fact and Conclusions of Law were entered on October 13, 1986. An Order Vacating Decree and Awarding Property was entered immediately thereafter on October 13, 1986. An order supplemental thereto was entered on October 13, 1986. A Notice of Appeal was filed to the Court of Appeals of the State of Washington, Division II on October 20, 1986. The Court of Appeals entered its unpublished opinion on February 10, 1988. Thereafter, the Petition for Review was sought from the Supreme Court of the State of Washington which was denied on May 4, 1988.

### **C. WHEN FEDERAL QUESTION RAISED:**

The federal questions presented by this Petition for Writ of Certiorari were first raised during the trial of this action in the Superior Court of the State of Washington for Thurston County. These issues were renewed before both the Court of Appeals of the State of Washington, Division II, and the Supreme Court of the State of Washington.

### **D. STATEMENT OF FACTS:**

The parties were married on January 21, 1946. They separated in October, 1961. In 1969, Petitioner commenced an action for divorce. The case was ultimately tried in 1977 and the marriage was dissolved on November 17, 1977. Said decree dissolving the marriage of the parties and awarding property provided in part as follows:

“ORDERED, ADJUDGED AND DECREED that the Plaintiff (the Petitioner herein) be and he is hereby awarded as his sole and separate property, free and clear of any and all claims of the Defendant (the Respondent herein) \* \* \* together with all retirement, pensions and other benefits Plaintiff has accumulated or acquired incident to his employment. It is further ORDERED, ADJUDGED and DECREED that the Defendant (the Respondent herein) be and she is hereby awarded as her sole and separate property \* \* \*, and in lieu of any interest in the retirement or pension benefits accrued for the benefit of the Plaintiff (Petitioner herein) incident to his employments a non-interest bearing judgment in the sum of \$44,877.72, which judgment the Plaintiff is directed to pay at the rate of \$358.38 or more per month by signing and processing the necessary papers to set up an allotment for Defendant.”

In addition thereto Respondent was granted judgment in the sum of \$5,400.00 and \$3,600.00 for delinquent support and maintenance payments. (CP 6-8)

The Findings of Fact entered in connection with said Decree of Dissolution in 1977 provided in part as follows:

"The Plaintiff's retirement benefits have been accrued over 432 months of service time of which 279 months represented the period of time that the parties were married. The present cash value of Plaintiff's retirement benefits is the sum of \$139,271.81."

In 1981, Respondent caused writs of garnishment to be served upon Petitioner and the United States Government. In 1984, Respondent commenced proceedings against Petitioner in Arizona.

Petitioner filed a Petition in 1984 in the Superior Court of the State of Washington for Thurston County seeking relief from the actions of the Respondent. Respondent filed a Counter-Petition in February of 1985. The case was tried and Findings of Fact and Conclusions of Law were entered on October 13, 1986. An Order Vacating Decree and Awarding Property was entered immediately thereafter on October 13, 1986. An Order Supplemental thereto was entered on October 13, 1986.

The Order Vacating Decree entered on October 13, 1986 had the effect of modifying the Decree of Dissolution entered on November 17, 1977, so that said 1977 Decree now reads in part as follows:

"ORDERED, ADJUDGED and DECREED that the Plaintiff (Petitioner herein) be and he is hereby awarded as his sole and separate property, free and clear of any and all claims of the Defendant (Respondent herein) \* \* \* all retirement, pension and other benefits Plaintiff has accumulated or acquired incident to his employment. It is further ORDERED, ADJUDGED and DECREED that the Respondent be and she is hereby awarded an interest in Petitioner's military retirement plan and that the Federal Government pay 32.3 percent of Petitioner's monthly retirement pay until the sum of \$66,495.06 has been paid, which sum includes interest on a past obligation which has heretofore been vacated herein."

## ARGUMENT

## A. DEPRIVATION OF PROPERTY AND CONFLICT WITH LAWS OF CONGRESS:

RCW 26.09.080 provides that in a proceeding for the dissolution of a marriage, the Washington Court shall make such disposition of the property and liabilities of the parties, either community or separate, as appears just and equitable after considering all relevant factors, including, but not limited to the nature and extent of the property, the duration of the marriage, and the economic situation of the spouses at the time the division of property is to become effective. Since 1975, the Washington Courts have interpreted the state law as allowing a division of military retired pay in a dissolution of marriage proceedings. In *Wilder v. Wilder*, 85 Wn.2d 365, 366-67, 534, P.2d 1355 (1975), the Court held that a military pension was not a gratuity but an asset acquired during coverture, that the pension was community property to the extent that community funds had been invested in it, and that said pension was properly before the Court for consideration in a dissolution proceedings. *Wilder v. Wilder*, *supra*, 366-367.

However, in June of 1981, the United States Supreme Court held that federal law governing such pay preempted state domestic relations laws and prohibited the division of military retired pay pursuant to a dissolution property settlement. *McCarty v. McCarty*, 453 U.S., 210, 69 L.Ed.2d 589, 101 Sup. Ct. 2728 (1981). Following widespread criticism of *McCarty*'s result, Congress enacted the Uniformed Services Former Spouses Protection Act ("USFSPS") returning to the States limited authority to characterize military retired pay as either community or separate property and to divide such pay pursuant to a dissolution property settlement. 10 U.S.C. Section 1408(c) (1982). Although the effective date of the act is February 1, 1983 [Public Law No. 97-252 Section 1006(a)], 97 Statute 737 (1982), language in the statute and the legislative history of the act makes it clear that congress intended to eliminate the effects of the *McCarty* decision by making the act retroactive to June 26, 1981 (the day after *McCarty* was filed) thus allowing state courts to modify decrees after *McCarty*. In *re: Marriage of McDonald*, 104 Wn.2d 745, 748, 719 P.2d 1196 (1985).

In the present case, the original Decree of Dissolution and Division of Property became final in 1977 — prior to June 21, 1981, the date of the *McCarty* decision. Said decree granted Respondent a non-interest bearing judgment against Petitioner in the sum of \$44,877.72 to be paid from Petitioner's military retirement pay at a rate of \$358.30 per month, and was not appealed. By the refusal of the Washington Supreme Court to retroactively apply the *McCarty* decision, the decree in the present case remained in full force and effect at all times subsequent to its entry. See, *Marriage of Brown*, 98 Wn.2d 46, 653 P.2d 602 (1982). Accordingly, the property division set forth in the 1977 decree was in full force and effect as of June 26, 1981.

It is clear that, under the terms of the Uniformed Services Former Spouses Protection Act ("USFSPA"), 10 U.S.C. Section 1408(c) (1982), the trial court had no jurisdiction to increase the amount of the payments to be made from Petitioner's retirement pay from the \$44,877.72 decreed in 1977 to \$66,495.06 in 1986. (The trial court modified said judgment in 1986 by increasing the judgment to \$66,495.06 — the amount of the original judgment plus accrued interest on the delinquent payments. The court further provided that payment of said judgment was to be made by direct payment of 32.3% of Appellant's net monthly retirement pay until such time as Respondent had received said increased judgment amount of \$66,495.00.) In passing the USFSPA, Congress made it clear that 10 U.S.C. Section 1408(d), the section of the USFSPA which authorizes the making of payments directly from the government to a former spouse, forbids, in the case of final property settlement decrees in effect as of June 26, 1981, any increase in such payments beyond the level provided by any such property settlement decree as it existed on June 26, 1981. The transition provisions of Section 1006(b) of Public Law 97-252 provide, in pertinent part:

However, in case of a court order that became final before June 26, 1981, payments under . . . (10 U.S.C. Section 1048(d) . . . may only be made in accordance with such order as in effect on such date and without regard to any subsequent modifications.

Clearly the decision rendered in this case to increase the number of payments to be made from Petitioner's military retirement pay to Respondent beyond the level established in the original 1977 Decree, which became final prior to June 26, 1981, flies in the face of the above statute. State courts are not at liberty to disregard federal law in matters such as this, regarding the conduct and control of military affairs. *McCarty v. McCarty*, 453 U.S. 210, 69 L.Ed.2d 589, 101 Sup. Ct. 2728 (1981). While the result of *McCarty v. McCarty*, *supra*, may have been changed by USFSPA, the underlying basis for the decision remains intact. State courts are preempted from acting in controvention of the express terms of federal law where clear and substantial federal interests are involved such as providing for retired service members and meeting personnel management needs of the armed forces.

## VII

### CONCLUSION

The decision of the Washington Courts are in controvention of federal law and accordingly, the decision should be reversed and the matter remanded to the Superior Court of the State of Washington for Thurston County for entry of a proper judgment.

Respectfully submitted,

Don Taylor

Of Fristoe, Taylor & Schultz, Ltd., P.S.  
Attorneys for Petitioner

## APPENDIX A

IN THE COURT OF APPEALS OF THE  
STATE OF WASHINGTONIN RE THE MARRIAGE OF  
ERNEST N. THARP,

NO. 10423-7-11

Division Two

*Appellant,*

Unpublished Opinion

v.

PHYLLIS M. THARP,

*Respondent.* Filed February 10, 1988

*WORSWICK, J.* — Ernest Tharp accumulated military retirement benefits during a substantial part of his marriage to Phyllis Tharp. When the marriage was dissolved in 1977, the trial court gave Mrs. Tharp a non-interest bearing judgment for \$44,877.72, in lieu of a direct interest in the retirement benefit. The judgment was payable at \$358.38 per month. The judgment contemplated, but unfortunately did not require, that Mr. Tharp would arrange an allotment from his retirement pay so that Mrs. Tharp would receive the payments directly.

Mr. Tharp made no such arrangement, has never made a payment, and, up to now, has frustrated every effort by Mrs. Tharp to collect. The trial court in this modification proceeding concluded that modification of the judgment pursuant to CR 60(b)(11) was appropriate, because no other remedy offered any hope for success.<sup>1</sup>

Although he offers, *pro forma*, several arguments on this appeal, Mr. Tharp's attorney properly concedes that the original judgment was in lieu of a division of the retirement benefit, and that such awards are modifiable under CR 60(b)(11) to facilitate a direct division of the benefit. See *Marriage of Parks*, 48 Wn. App. 166, 737 P.2d 1316 (1987); *Marriage of Flannagan*, 42 Wn. App. 214, 709 P.2d 1247, 105 Wn.2d 1005 (1985). He contends, however, that the court erred because the amount of the judgment as modified was substantially greater than the original award. We disagree.

The court did two things: (1) it modified the arrangement to assure that Mrs. Tharp would be paid, and (2) it adjusted the amount so that she would receive the *value* she was awarded in 1977. To accomplish this, the court added 8 percent interest to each of the past due and unpaid installments and, to the sum, added the amount that would have remained had Mr. Tharp made his payments. The judgment as so adjusted came to \$66,495.06. The court ordered that 32.3 percent of Mr. Tharp's retirement benefit be paid to Mrs. Tharp until the adjusted amount was satisfied. This was not error. Mrs. Tharp will only receive the *value* of the 1977 award; *i.e.*, what would have been hers had Mr. Tharp done from the beginning.

Affirmed.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

Worswick, J.

WE CONCUR:

Petrich, G.

Reed, J.

<sup>1</sup>Mrs. Tharp also sought relief under CR 60(b)(4). The trial court correctly refused to apply this section. No fraud, misrepresentation or misconduct was involved in the procurement of the judgment.

APPENDIX B

THE SUPREME COURT  
STATE OF WASHINGTON

May 4, 1988

Fristoe, Taylor & Schultz  
Mr. Don P. Taylor  
Professional Arts Bldg., Suite 1  
Olympia, Washington 98501

Connolly, Holm, Tacon & Meserve  
Ms. Christina A. Meserve  
301 Heritage S. & L. Bldg.  
Olympia, Washington 98501

Re: Supreme Court No. 54923-1 - Ernest N. Tharp v. Phyllis M. Tharp  
Court of Appeals No. 10423-7-II

Counsel:

The above entitled petition for review was considered by the Court on its May 3, 1988, petition for review calendar.

The petition was denied by order number 177/32 filed on May 4, 1988.

Very truly yours,

Reginald N. Shriver  
REGINALD N. SHRIVER  
Supreme Court Clerk

RNS:mja

**APPENDIX C**

**IN THE COURT OF APPEALS OF THE  
STATE OF WASHINGTON**

**DIVISION II**

**IN RE THE MARRIAGE OF: No. 10423-7-II**

**ERNEST N. THARP, MANDATE**  
Appellant,

v.

**PHYLLIS M. THARP, Thurston County Superior Court**  
Respondent.

The State of Washington to: The Superior Court of the State of Washington in and for Thurston County

This is to certify that the opinion of the Court of Appeals of the State of Washington, Division II, filed on February 10, 1988, became the decision terminating review of this court of the above entitled case on March 3, 1988. This cause is mandated to the superior court from which the appeal was taken for further proceedings in accordance with the attached true copy of the opinion.

cc: Don P. Taylor  
Attorney at Law  
Professional Arts Bldg.  
Olympia, WA 98501

Christina A. Meserve  
Attorney at Law  
301 Heritage S & L Bldg.  
Olympia, WA 98501

IN TESTIMONY WHEREOF, I  
have hereunto set my hand and af-  
fixed the seal of said Court at  
Tacoma, this 6th day of May, 1988.

David C. Ponzoha  
Clerk of the Court of Appeals,  
State of Washington, Div. II

